

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

November 26, 2007

---

In the Matter of Michael Jeanson &  
Jeanson Homes, Inc.

---

OADR Docket No. WET-2007-005  
DEP File No. 85-971  
Acton, MA

**SCHEDULING ORDER**

1. This matter is an appeal of a Reviewable Decision in a Wetlands Permit case,<sup>1</sup> and this Scheduling Order (“the Order”) has been issued to secure the just and speedy determination of this appeal in accordance with the requirements of 310 CMR 1.01 and 310 CMR 10.05(7)(j) (effective October 31, 2007). This Order informs the parties to this appeal of the dates of the Pre-Screening Conference, and Hearing. See ¶¶ 3 and 10 of this Order. The issuance of this Order does not necessarily mean that the petitioner has filed this appeal in accordance with the requirements of 310 CMR 1.01 and 310 CMR 10.05(7)(j). The Presiding Officer assigned to this appeal may vacate, modify, or stay this Order at a later date if he or she recommends that the appeal be dismissed or stayed on his or her initiative, or in response to a

---

<sup>1</sup> A “Reviewable Decision” in a Wetlands Case is a MassDEP decision that is (1) a superseding order of conditions, (2) a superseding denial of an order of conditions, (3) a superseding determination of applicability and/or a superseding order of resource area delineation, or (4) a variance. See 310 CMR 10.04. The provisions of 310 CMR 10.05(7)(j) also govern the appeal of a MassDEP decision denying a request for a superseding order of conditions.



motion filed by a party to this appeal. See 310 CMR 1.01(5)(a)2.; 310 CMR 1.01(5)(a)3.; 310 CMR 1.01(5)(a)15.d.; 310 CMR 1.01(5)(a)15.f.; 310 CMR 1.01(6)(h); 310 CMR 10.05(7)(j)5.d.; 310 CMR 10.05(7)(j)7.d.<sup>2</sup>

2. On November 16, 2007, the Office of Appeals and Dispute Resolution (“OADR”) of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) received this appeal of John Appelmans (“the petitioner”).<sup>3</sup> In this appeal, the petitioner has appealed the October 16, 2007 decision of the Department’s Central Regional Office issuing a Superseding Order of Conditions to Michael Jeanson and Jeanson Homes, Inc.

---

<sup>2</sup> Under 310 CMR 1.01(5)(a)2. and 310 CMR 1.01(5)(a)15.f., the Presiding Officer may recommend dismissal of an appeal on various grounds, including lack of standing, lack of jurisdiction, mootness, untimeliness, or “where the record discloses that the proposed project, activity has been denied by a local, state or federal agency or authority pursuant to law other than that relied on by the Department in the decision appealed from, and such denial has become final.” Under 310 CMR 1.01(5)(a)3.; 310 CMR 1.01(5)(a)15.d.; and 310 CMR 1.01(6)(h), the Presiding Officer may stay the proceedings in an appeal “where the failure to previously obtain a final decision required under another law would result in an unnecessary expenditure of the Department’s administrative resources, or for other good cause.” Indeed, under 310 CMR 1.01(6)(h), “the Presiding Officer shall stay administratively any appeal of a superseding determination or order of conditions issued under M.G.L. c. 131, § 40 when the determination or order is denied under a local wetlands bylaw and the denial is appealed to court.” Accordingly, the parties to this appeal are directed to inform the Presiding Officer as soon as possible of any ground warranting dismissal or a stay of this appeal. See also 310 CMR 10.05(7)(j)5.d.; and 310 CMR 10.05(7)(j)7.d.

<sup>3</sup> OADR is separate and independent of MassDEP’s program offices, Regional Offices, and Office of General Counsel (“OGC”). OADR is staffed by a Case Administrator, an Administrator of Alternative Dispute Resolution (“ADR”), and Presiding Officers. A Chief Presiding Officer, who reports to MassDEP’s Commissioner, supervises Presiding Officers and other OADR staff.

Presiding Officers in OADR are experienced attorneys at MassDEP appointed by MassDEP’s Commissioner to serve as neutral hearing officers, and are responsible for facilitating settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting hearings and making Recommended Final Decisions on appeals. See 310 CMR 1.01(1)(a); 310 CMR 1.01(1)(b); 310 CMR 1.01(5)(a)15. Under 310 CMR 1.03(7), Ex Parte communications between OADR’s Presiding Officers and MassDEP personnel regarding a pending appeal are expressly prohibited and all MassDEP staff involved in the appeals process are informed of these requirements. Additionally, Recommended Final Decisions of Presiding Officers in appeals are subject to review by MassDEP’s Commissioner pursuant to 310 CMR 1.01(14). Under the regulation, the Commissioner may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision. All Final Decisions are subject to judicial review pursuant to G.L. c. 30A, § 14. These provisions ensure that the appeal process at MassDEP will be fair and will result in unbiased decision-making.

("the applicants"). The parties to this appeal are:

**Applicants:** Michael Jeanson &  
Jeanson Homes, Inc.  
12 Kennedy Lane  
Acton, MA 01720;

**Petitioner:** John Appelmans  
4 Spring Hill Road  
Acton, MA 01742;

**The Local Conservation Commission:** Acton Conservation Commission  
472 Main St  
Acton, MA 01720;

**Ten Citizens Group:** none at this time;

**The Department:** Philip Nadeau, Section Chief  
MassDEP/Central Regional Office  
Bureau of Resource Protection  
627 Main Street  
Worcester, MA 01608;

Mary Jude Pigsley, Chief Regional Counsel  
MassDEP/Central Regional Office  
Bureau of Resource Protection  
627 Main Street  
Worcester, MA 01608;

MacDara Fallon, Deputy General Counsel  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, Massachusetts 02108;

**Other Parties:** none at this time;

**Potential Intervenors:** none at this time.

3. A Presiding Officer of OADR will conduct a Pre-Screening Conference with the parties to this appeal at 2:00 p.m., Tuesday, December 11, 2007, in the Department's Central Regional Office to determine the appeal's potential amenability to settlement through alternative

dispute resolution or other means.<sup>4</sup> At the Pre-Screening Conference, the Presiding Officer will also identify the issues for resolution in this appeal in accordance with ¶ 8 of this Order.

If any party to this appeal has a scheduling conflict that will prevent the party from attending the scheduled Pre-Screening Conference, that party must inform the Presiding Officer and the parties to this appeal in writing of that scheduling conflict within seven (7) days of the date of this Order. Within the same period, the parties must confer and inform the Presiding Officer in writing that they are amenable to re-scheduling the Pre-Screening Conference to (the Tuesday before the original Pre-Screening Conference date), or must propose three alternative dates to the Presiding Officer before (the 30<sup>th</sup> day after the filing of the Notice of appeal) for the Pre-Screening Conference.

All written notifications to the Presiding Officer required by this Order must be made through Anne Hartley, OADR's Case Administrator, by (1) forwarding an electronic mail message to Ms. Hartley at [Anne.Hartley@state.ma.us](mailto:Anne.Hartley@state.ma.us), or (2) written correspondence to Ms. Hartley by hand delivery at OADR or facsimile delivery at (617) 574-6880.

4. All parties to this appeal are required to attend the Pre-Screening Conference, and the parties should be prepared to fully discuss their respective positions in the appeal at the Conference. The failure of any party to attend the Pre-Screening Conference, to participate in the Conference in good faith, or to comply with any requirements of this Order will result in the

---

<sup>4</sup> See footnote 3, at p. 2 of this Order. Under 310 CMR 1:01(5)(a)15., the authority of Presiding Officers to prescreen appeals includes the power to conduct prescreening conferences with the parties to an appeal to discuss potential settlement of the appeal, identify the issues in an appeal, and to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions." Presiding Officers are also authorized to conduct simplified hearings of appeals in accordance with 310 CMR 1.01(8)(a), and issue recommended final decisions for dismissals of appeals. 310 CMR 1:01(5)(a)15.

imposition of appropriate sanctions on that party pursuant to 310 CMR 1.01(10).<sup>5</sup>

5. Prior to the Pre-Screening Conference, the parties to this appeal shall confer to discuss the possibility of settlement of this appeal, and the amenability of this appeal to mediation or other forms of alternative dispute resolution. It shall be the responsibility of the petitioner to initiate these settlement discussions at least ten (10) days prior to the Pre-Screening Conference. The settlement discussions may be conducted in person, or by the telephone.

6. Prior to the Pre-Screening Conference, the parties to this appeal may request the assistance of a Department mediator to facilitate their settlement discussions. The request should be made in writing to Aprel McCabe, Administrator of OADR's ADR Program, by

- (1) forwarding an electronic mail message to Ms. McCabe at [Aprel.McCabe@state.ma.us](mailto:Aprel.McCabe@state.ma.us), or
- (2) written correspondence to Ms. McCabe by hand delivery at OADR or facsimile delivery at (617) 574-6880. The Presiding Officer may also order the parties to attend an Alternative Dispute Resolution Information Session that will be facilitated by Ms. McCabe. Regardless of any referral to the ADR Program, the Pre-Screening Conference will proceed as scheduled unless the appeal is settled prior to the Conference. See ¶¶ 7-8 of this Order.

---

<sup>5</sup> Possible sanctions under 310 CMR 1.01(10) include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);
- (d) striking the party's pleadings in whole or in part;
- (e) dismissing the appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

7. No later than (3) business days prior to the scheduled Pre-Screening Conference, the petitioner shall file a written statement with OADR confirming that the petitioner initiated and conducted settlement discussions with the other parties to this appeal in accordance with this Order. The petitioner's statement shall set forth the time, date, location and duration of the settlement discussions; who was present for each party; and whether the parties reached a settlement of the appeal.

If the petitioner's statement reports that the appeal has been settled, the parties shall file fully executed settlement documents with the Presiding Officer at the scheduled Pre-Screening Conference, or, at the parties' request, the Conference may be postponed for no more than ten (10) days, so that the parties can prepare, execute, and file settlement documents for this appeal.<sup>6</sup> If fully executed settlement documents are not filed with the Presiding Officer by the rescheduled Pre-Screening Conference date, the Conference shall proceed on the rescheduled date. See ¶ 8 of this Order.

If the petitioner's statement reports that the appeal has not been settled, the Presiding Officer may order the parties to attend an Alternative Dispute Resolution Information Session that will be facilitated by Ms. McCabe. See ¶ 6 of this Order. Regardless of any referral to the ADR Program, the Pre-Screening Conference shall proceed as scheduled. See ¶ 8 of this Order.

8. Unless this appeal has been settled in accordance with ¶ 7 of this Order, the Pre-Screening Conference shall proceed as scheduled on the original Conference date or no later than ten (10) days from the Conference date. At the Pre-Screening Conference, the Presiding Officer will identify the issues for resolution in this appeal, and the parties should be prepared to fully

---

<sup>6</sup> The parties should be aware that generally Pre-Screening Conferences can only be re-scheduled due to extraordinary circumstances. To promote settlement efforts, however, the Conference date may be postponed for no more than 10 days under circumstances discussed above. In any event, the re-scheduling of the Conference will not extend any other deadlines for resolution of this appeal, including the deadlines in 310 CMR 10.05(7) for the filing of Pre-filed Testimony. See footnote 7, at p. 7 of this Order.

discuss their respective positions in the appeal. At the Pre-Screening Conference, each party shall file a Pre-Hearing Statement with the Presiding Officer containing the following information:

- (1) a brief summary of the Reviewable Decision being appealed in this case;
- (2) a brief summary of the final relief that the party seeks in this appeal;
- (3) a list of disputed relevant facts for resolution in this appeal and the party's position on each issue (what the party expects to prove at the Hearing on the appeal); and
- (4) a list of legal issues for resolution in this appeal, and the party's position on the issue.

9. For any appeal not resolved at the Pre-Screening Conference, the Presiding Officer will issue a Pre-Screening Conference Report and Order to the parties to this appeal within seven (7) days after the Conference ("the Report"). The Report will contain a Statement of Issues setting forth the contested issues of material fact and legal issues to be resolved at the Hearing on this appeal. All subsequent Pre-filed Testimony in the appeal shall be limited to resolving those issues and shall not raise any additional issues. The schedule for filing Pre-filed Testimony will be set forth in the Report in accordance with the requirements of 310 CMR 10.05(7)(j)7.g.<sup>7</sup>

---

<sup>7</sup> Under 310 CMR 10.05(7)(j)3. through 10.05(7)(j)6., the time table for filing Pre-filed Testimony is as follows:

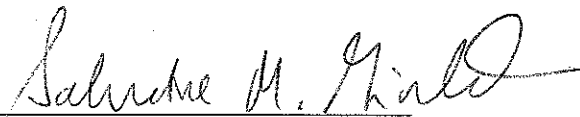
- the petitioner, and any intervenor aligned with the petitioner (an intervenor that challenges the Reviewable Decision) must file the Pre-filed Direct Examination Testimony of their respective witnesses no later than 45 days after the **original** date of the Pre-Screening Conference;
- the respondent, and any intervenor aligned with the respondent (an intervenor that supports the Reviewable Decision) must file the Pre-filed Direct Examination Testimony of their respective witnesses no later than 30 days after the petitioner and/or any aligned intervenor files the Pre-filed Direct Examination Testimony of their witnesses;
- the petitioner, and any intervenor aligned with the petitioner, must file the Pre-filed Rebuttal Testimony of their respective witnesses, if any, within seven days after the respondent and any aligned intervenor files the Pre-filed Direct Examination Testimony of their witnesses.

10. The Hearing on this appeal ("the Hearing") has been scheduled for 10:00 a.m., Tuesday, March 11, 2008, in the Department's Central Regional Office. The Hearing will be limited to one six hour day (hearing: 9:00 a.m. to 1:00 p.m.; lunch break: 1:00 p.m. to 2:00 p.m.; hearing: 2:00 pm to 4:00 p.m.), and its primary function will be the cross-examination of witnesses who have filed timely Pre-filed Testimony in this appeal. At the Hearing, the only witnesses who will be cross-examined are those individuals who have filed timely Pre-filed Testimony in this appeal. Their cross-examination will be limited to the matters asserted in their Pre-filed Testimony as to which there are disputed facts.

11. Within thirty (30) days after the Hearing, the Presiding Officer will issue a Recommended Final Decision for consideration by MassDEP's Commissioner. MassDEP's Commissioner will issue a final written decision in accordance with 310 CMR 1.01(14)(b) and 310 CMR 10.05(7)(j)8., presumptively within six (6) months of the Reviewable Decision, or in the case of an appeal deemed Major or Complex in which the schedule was extended, within seven (7) months of the Reviewable Decision.

Date:

11/26/07

  
Salvatore M. Giorlandino  
Acting Chief Presiding Officer



## **SERVICE LIST**

**Applicants:** Michael Jeanson &  
Jeanson Homes, Inc.  
12 Kennedy Lane  
Acton, MA 01720;

**Petitioner:** John Appelmans  
4 Spring Hill Road  
Acton, MA 01742;

**The Local Conservation Commission:** Acton Conservation Commission  
472 Main St  
Acton, MA 01720;

**The Department:** Philip Nadeau, Section Chief  
MassDEP/Central Regional Office  
Bureau of Resource Protection  
627 Main Street  
Worcester, MA 01608;

Mary Jude Pigsley, Chief Regional Counsel  
MassDEP/Central Regional Office  
Bureau of Resource Protection  
627 Main Street  
Worcester, MA 01608;

MacDara Fallon, Deputy General Counsel  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, Massachusetts 02108;

**OADR Alternative Dispute  
Resolution Administrator:**

Aprel McCabe  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, MA 02108.